Sabah Forest Industries Sdn Bhd v UNP Plywood Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — JUDICIAL REVIEW/CIVIL APPEAL NO 08–275 OF 2009
ZAKI AZMI CHIEF JUSTICE, JAMES FOONG AND HELILIAH FCJJ
11 FEBRUARY 2010

Civil Procedure — Appeal — Jurisdiction — Application to review court's earlier decision — Grounds for — Whether warranted court to invoke r 137 of the Rules of the Federal Court 1995 — Whether injustice or abuse of process of the court occasioned

The applicant by a motion under r 137 of the Rules of the Federal Court 1995 ('RFC') sought to move the court for an order to set aside its decision of 11 September 2009 and order a rehearing of the appeal. The application was on the grounds, inter alia, (i) that there was a breach of natural justice as the parties were not heard on the essential points of decision; and (ii) lack of jurisdiction of the panel of the Federal Court to de facto overrule the earlier decision of the leave panel of the Federal Court to grant leave on those questions. The respondent, on the other hand, submitted that the grounds of judgment in hearing the appeal proper was sound and should not be disturbed.

Held, dismissing the motion with costs:
There must be finality to a decision when the matter was brought to the court. The court, after reading the written submission of the parties, having heard the applicant and having perused through the reasons given by the Federal Court, found no reason to allow the application. The two issues raised by the applicant did not warrant the court to invoke r 137 of the RFC. The reasoning given by the court in the appeal proper was a sound reasoning and no injustice or abuse of the process of the court had been occasioned (see paras 7 & 9).

[Bahasa Malaysia summary

Perayu, melalui usul di bawah k 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 memohon perintah untuk mengetepikan keputusan mahkamah pada 11 September 2009 dan memerintahkan suatu perbicaraan semula rayuan tersebut. Permohonan tersebut adalah atas alasan, antara lain, (i) bahawa terdapat pelanggaran keadilan asasi kerana pihak-pihak tidak didengar dalam bahagian-bahagian penting keputusan; dan (ii) kurangnya bidang kuasa panel Mahkamah Persekutuan untuk de facto menolak keputusan awal panel

kebenaran Mahkamah Persekutuan untuk membenarkan atas persoalan-persoalan tersebut. Responden, sebaliknya, menghujahkan bahawa alasan-alasan penghakiman dalam perbicaraan rayuan tersebut adalah sempurna dan tidak perlu diubah.

Diputuskan, menolak usul dengan kos:
Harus terdapat kemuktamadan dalam satu keputusan apabila ia dibawa ke mahkamah. Mahkamah, selepas membaca hujahan bertulis pihak-pihak, selepas mendengar pemohon dan selepas meneliti alasan-alasan yang diberikan oleh Mahkamah Persekutuan, tidak mempunyai sebarang alasan untuk membenarkan permohonan. Dua isu yang dibangkitkan oleh pemohon tidak mewajarkan mahkamah untuk membangkitkan k 137 KMP. Alasan yang diberikan oleh mahkamah dalam rayuan tersebut adalah alasan yang sewajarnya dan tiada ketidakadilan atau salah guna proses mahkamah telah berlaku (lihat perenggan 7 & 9).]

Notes

For cases on jurisdiction, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 1083–1085.

Cases referred to

Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1, FC (refd)
Denish Madhavan v PP [2010] MLJU 47, FC (refd)
Fitzleet Estates Ltd v Cherry (Inspector of Taxes) [1977] 1 WLR 1345, HL (refd)
Goldsmith v Sperrings Ltd [1977] 2 All ER 566, CA (refd)

Legislation referred to

Rules of the Federal Court 1995 r 137

Cyrus Das (Nobert Yapp and Celestina Stuel Galid with him) (Jayasuriya Kah & Co) for the appellant.
Alvin John (Marina Tiu with him) (Yap Chin Tiu) for the respondent.
Juprin Wong (Senior Federal Counsel, Attorney General's Chambers) watching brief for the State of Sabah.

Zaki Azmi Chief Justice:

[1] By this motion, the applicant, relying on r 137 of the Rules of the Federal Court 1995, sought to move the court for an order to set aside its decision of 11 September 2009 and to order a rehearing of the appeal. Two grounds were canvassed before us. First, it was alleged that there was a breach of natural justice as the parties were not heard on the essential points of decision and secondly, it was regarding the lack of jurisdiction of that panel

of the Federal Court to de facto overrule the earlier decision of the leave panel of the Federal Court to grant leave on those questions.

Rule 137 of the Rules of the Federal Court 1995

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[2] According to the applicant, on the first issue, the decision arrived at by the Federal Court in the appeal was not even argued before the court. Hence, it is a breach of the *audi altera partem* as the very point that the court considered was thought of by the court itself. In any case if the court were to decide that there is a new issue, the proper procedure would be to invite the parties to address the issue in writing or by relisting the case for hearing on such points (see *Goldsmith v Sperrings Ltd* [1977] 2 All ER 566).

[3] As for the second issue, it was argued that the court did not have the jurisdiction to review the suitability of the questions framed and already approved by the leave panel. By doing so, it was seen to overrule the decision of the leave panel.

[4] The respondent disagreed by submitting that the grounds of judgment of the Federal Court in hearing of the appeal proper was sound and should not be disturbed. As such, this application should be dismissed with costs.

[5] Our duty at this stage is to identify whether this application meets the threshold of r 137 of the Rules of the Federal Court 1995. In so doing, we would have to rely on the circumstances under which r 137 of the Rules of the Federal Court 1995 is allowed.

[6] Such circumstances are well established. In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1, Abdul Hamid Mohamed FCJ (as he then was) said at para 14:

> That leads us to the instant application. What is this applicant seeking to do? It is simply to ask this court to exercise its review jurisdiction to set aside the decision of this court overturning the finding of facts made by the Court of Appeal and reinstating the decision of the trial judge on the facts. That is clearly outside the scope of the review jurisdiction of this court. To allow the application is to invite all the vices that this court has been repeatedly warning against ie, there will be no finality in its judgment and, it will encourage judge-shopping.

[7] In short, there must be a finality to a decision when the matter is brought to the court. I said in *Security Paper Mills Sdn Bhd* at para 45:

> There must be a finality to deciding any dispute. It cannot be reviewed ad infinitum. It must end somewhere and in our system, it is the Federal Court. If there is any intention that r 137 be read as conferring appellate jurisdiction, this court cannot also sit as an appellate court to hear appeals from itself (see art 128 of the Federal Constitution and the decisions of the Federal Court in the cases of *Abdul Ghaffar bin Md Amin v Ibrahim bin Yusoff & Anor* [2008] 3 MLJ 771; [2008] 5 CLJ 1 and *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753; [2008] 5 CLJ 201.

[8] I have also cited Lord Wilberforce's view regarding review in the House of Lords decision in *Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 1 WLR 1345 which was referred to in *Denish Madhavan v Public Prosecutor* [2010] MLJU 47 which is yet to be reported. There I said the following:

> [10] In *Fitzleet Estates LTD v Cherry (Inspector of Taxes)*, Lord Wilberforce said the following regarding review of House of Lord's decisions:
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> > My Lords, in my firm opinion, the Practice Statement of 1966 was never intended to allow and should not be considered to allow such a course. Nothing could be more undesirable, in fact, than to permit litigants, *after a decision has been given by this House with all appearance of finality*, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected. True that the earlier decision was by majority: I say nothing as to its correctness or as to the validity of the reasoning by which it was supported. That there were two eminently possible views is shown by the support for each by at any rate two members of the House. But doubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.
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> (Emphasis added.)
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> [11] *Fitzleet Estates LTD v Cherry (Inspector of Taxes)* involves issues on whether interest charged on loan by the company is taxable. In the earlier case of *Chancery Lane Safe Deposit and Offices Co Ltd v Inland Revenue Commissioners* [1966] AC 85; [1966] 2 WLR 251; [1966] 1 All ER 1 (HL), the majority of the House of Lords decided that a certain provision of the Income Tax Act 1952 applied while two members dissented. In the *Fitzleet Estates*' case, the appellant challenged the *Chancery Lane*'s case (delivered 11 years earlier) and invited the House of Lords to depart from its earlier decision based on the practice statement cited above. It was in this context that Lord Wilberforce disagreed to permit a litigant to return to the House hoping that a differently constituted panel would be persuaded to take the

view that its predecessors rejected. According to him, there must be a finality. In England, there has been a reluctance to review any well set principles (see *Radcliffe v Ribble Motor Services Ltd* [1939] AC 215; [1939] 1 All ER 637 (HL) and *Nash v Tamplin & Sons Ltd* [1952] AC 231; [1951] 2 All ER 869 (HL)).

[12] I realise that the *Fitzleet Estates*' case deals with review of settled principles of law while r 137 deals with the power to review its own decision if it is satisfied that there had been injustice. For every case, there must be a finality. Against finality is the issue of whether there had been an injustice. Justice and injustice is very wide and more often than not, subjective.

[9] Having read their written submission, having heard the applicant and having perused through the reasons given by the Federal Court, I find no reason to allow this application. In my opinion, the two issues raised by the applicant in this case do not warrant this court to invoke r 137 of the Rules of the Federal Court 1995. The reasoning given by this court in the appeal proper is in my opinion a sound reasoning. No injustice or abuse of the process of the court has been occasioned.

[10] I also find no necessity to delve into the issues in minute detail in this leave for review application.

[11] As such, this motion is dismissed with costs.

[12] My learned brother James Foong Cheng Yuen FCJ and Heliliah Mohd Yusof FCJ have read this judgment in draft and have indicated their concurrences.

Motion dismissed with costs.

Reported by M Sivabarathi